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No. 91-216

In The

Supreme Court of the United States

October Term, 1991

PHILLIP MATTHEWS,

Petitioner,

v.

GREENEVILLE LIGHT AND POWER SYSTEM, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Sixth Circuit Court Of Appeals

BRIEF FOR RESPONDENT ROBERT C. LAY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the absence of Respondent Tennessee Valley Authority as a party, did the district court have an independent basis for subject matter jurisdiction under 28 U.S.C. § 1331 because the power contract between the Respondents Tennessee Valley Authority and the Town of Greeneville, TN. incorporated certain Federal Energy Regulatory Commission accounting guidelines?

PARTIES TO THE PROCEEDINGS

The Petitioner in this action is Phillip Matthews. The Respondents in this action are the Tennessee Valley Authority (hereinafter, "TVA"); Robert C. Lay, the Town of Greeneville, TN.; Norman Williamson, acting superintendent of the Greeneville Light & Power System (hereinafter, "GL&PS"), and Charles Worley, Paul Hite, Jess Musick and J. E. Bullen, members of the Board of Greeneville Light & Power System.

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BRIEF FOR RESPONDENT ROBERT C. LAY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert C. Lay respectfully requests that this Court deny the petition for Writ of Certiorari seeking review of the Sixth Circuit decision entered on May 2, 1991.

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. xxiv-xliv) and the district court (Pet. App. iii-xviii) are not

reported. The court of appeals' decision is noted at 932 F.2d 968.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1991. The petition for a writ of certiorari was filed July 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATEMENT

Respondent Lay adopts by reference the STATEMENT of Respondent TVA contained in TVA's Brief in Opposition. TVA, except to note the language of the court of appeals, has chosen not to address Petitioner's QUESTION FOR REVIEW No. 3 dealing with federal question jurisdiction. Respondent Lay, while restating this question, restricts his Brief to a discussion of the lack of federal question jurisdiction over the Petitioner's alleged claims for relief against him and the Respondents other than TVA.

When this action was originally filed in November, 1988, Respondent Lay was the General Manager (or Superintendent) of GL&PS. Petitioner Matthews had, until August, 1988, been the controller of GL&PS for a number of years, reporting directly to Respondent Lay. In August, 1988, Respondent Lay terminated Petitioner Matthews. Petitioner filed a separate alleged wrongful discharge action against Respondent Lay and others in the

district court, NO. CIV. 2-88-468, which currently is set to be tried on October 21, 1991. Petitioner also filed an action in the Chancery Court for Greene County, Tennessee against Respondent Lay and others in April, 1989 (Civil Action No. 89-108) alleging most of the claims for relief under state law which petitioner asserts in this action. Like the discharge case, the case in state court remains pending at this time, with no trial date having been set.

GL&PS was created by the Respondent Town of Greeneville, Tennessee pursuant to the Municipal Electric Plant Law of 1935, T.C.A. § 7-52-101 – § 7-52-306 (as amended). Under that state law, the Town was authorized to and did create the GL&PS Board. T.C.A. § 7-52-107. Respondents Worley, Hite, Musick and Bullen comprised this Board. "The general supervision and control of the acquisition, improvement, operation and maintenance of the electric plant falls to the Board." T.C.A. § 7-52-116(a). The state law confers various powers upon the Board including the authority to " . . . appoint an electric plant superintendent." T.C.A. § 7-52-114(b). The Superintendent serves " . . . at the pleasure of the supervisory body and may be removed by such body at any time." *Id.* The Superintendent has charge of "all actual construction, the immediate management and operation of the electric plant and the enforcement and execution of all rules, regulations, programs, plans and decisions made or adopted by the [Board]." T.C.A. § 7-52-117(a). He appoints "all employees" and fixes their "duties and compensation", with certain exceptions. T.C.A. § 7-52-114(b). He makes "all contracts, subject to the approval of the [Board]." T.C.A. § 7-52-117(d). He also has other powers

and responsibilities subject to the approval, supervision and direction of the Board. *Id.*

As noted by Petitioner, both an Original and Amended and Restated Complaint were filed by Petitioner in the district court. (Pet. 8, 12-14). (*See*, R. 17-39: Amended and Restated Complaint, pp. 1-23). The allegations against Respondent Lay in said Amended and Restated Complaint were as follows:

1. Lay, as manager of GL&PS, willfully failed "to keep full and proper books and records", and, as such, violated Tennessee law (T.C.A. § 7-52-117) (R. 25-26);

2. Lay issued directions which resulted in GL&PS violating certain accounting guidelines of the Federal Energy Regulatory Commission (which the power contract between TVA and GL&PS required GL&PS to utilize). This allegedly violated state law. (*Id.*);

3. By so acting, Lay caused the Town of Greeneville to breach its contract with TVA (*Id.*);

4. The requirement that the Superintendent make and keep full and proper records in accordance with the FERC guidelines was ministerial in nature and was therefore appropriate for the issue of a writ of mandamus to Lay and the Board (R. 26-27);

5. Lay willfully failed to perform his statutory obligations under state law resulting in the GL&PS expenses to be overstated and its net income understated (*Id.*);

6. Lay, in willfully failing to observe said accounting guidelines as required by contract, caused Petitioner to suffer injury through the imposition of higher electric rates, subjecting Lay to personal liability under state law (*Id.*);

7. Lay tortiously induced the Town of Greeneville to breach its contract with TVA, making Lay liable for treble damages under state law (*Id.*);

8. As a result of Lay's failure to abide by the FERC guidelines, the amount paid by GL&PS in lieu of taxes to the Town of Greeneville and Greene County under state law was reduced (R. 31); and

9. As a result of Lay's failure to abide by the FERC guidelines, GL&PS generated funds in excess of $10,000,000, even though it was not supposed to make a profit under state law. (R. 32).

Respondent Lay filed Motions to Dismiss, which, along with Motions filed by the other Respondents, were treated as motions for summary judgment by the district court. (Pet. App. iii-iv). In its original Order and Memorandum (Pet. App. ii-xvii), the claims against the non-TVA Respondents were dismissed with prejudice. (*Id.*). The district court found that absent the presence of TVA, " . . . the plaintiff's remaining claims are all based upon state law. These include breach of contract, tortious breach of contract and misfeasance in office." (Pet. App. xv). Recognizing that it had only "minimal discretion" in deciding whether to exercise pendent jurisdiction over

these state law claims once federal claims has been dismissed, it held that "judicial economy is not substantially served by proceeding solely upon the state law claims." (*Id.*).

Petitioner filed a Motion for Reconsideration and the district court ultimately modified its original decision by holding the dismissal of the claims against all Respondents except TVA would be without prejudice. (Pet. App. xviii-xix). In doing so, the district court reiterated that even though the power contract between TVA and the Town of Greeneville incorporated the FERC guidelines, " . . . the plaintiff's claim remains essentially a breach of contract action grounded in state law." (Pet. App. xxii-xxiii). The court of appeals held the district court did not abuse its discretion in dismissing the claims against Respondent Lay and the others without prejudice, finding neither an "overwhelming interest in judicial economy" nor any compelling "fairness concerns", which would support continued federal subject matter jurisdiction. (Pet. App. xli-xlii).

~~In foot~~note 5 to its decision, the court of appeals rejected Petitioner's argument that an independent basis for federal question jurisdiction under 28 U.S.C. § 1331 arose from the FERC accounting guidelines:

> " . . . we cannot conclude that the FERC accounting guidelines create any cause of action. Instead, this case involves the interpretation of a contract which invoked federal accounting standards. It is well settled that 'the mere presence of a federal issue in a state cause of action does

> not automatically confer federal question jurisdiction.' *Merrill Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 813 (1986)"

(Pet. App. xlii-xliii). Petitioner did not seek rehearing by the panel or rehearing en banc.

ARGUMENT

A. NO FEDERAL QUESTION JURISDICTION IN THE ABSENCE OF TVA AS A PARTY

Respondent Lay adopts by reference and incorporates herein the ARGUMENT of Respondent TVA with respect to the issues addressed therein. TVA has chosen not to address the third question raised by the petition which, while confusing *in personam* jurisdiction with subject matter jurisdiction [*See*, e.g., the wording of QUESTIONS PRESENTED FOR REVIEW. No. 3 (Pet., p. ii)], essentially asserts that in the absence of TVA as a party, there is some independent basis for federal question jurisdiction over the alleged claims for relief asserted against the remaining Respondents, because the power contract between TVA and the Town of Greeneville incorporates certain Federal Energy Regulatory Commission accounting guidelines. It is this jurisdiction question which Respondent Lay addresses herein.

It is respectfully asserted that there is no basis for federal question jurisdiction over any alleged claims for relief asserted against the non-TVA Respondents including Respondent Lay. This case involves only the application of well-settled principles of law by the district court and the court of appeals, and the decisions below do not

conflict with any decision of this Court or any other court of appeals. Further review, accordingly, is not warranted.

Paragraph 8 of the "Power Contract Between Tennessee Valley Authority and City of Greeneville, Tennessee" incorporates into said contract certain additional provisions which are contained in a document entitled "SCHEDULE OF TERMS AND CONDITIONS," which is separately attached to the contract and made a part thereof by reference. (R. 43: p. 6). Section 1(b) of this "SCHEDULE" reads in pertinent part:

> "(b) Municipality shall keep the general books of accounts of the electric system according to the Federal Regulatory Commission Uniform System of Accounts . . . "

(R. 51). This "SCHEDULE" places a number of additional contractual obligations on the "municipality."

Petitioner argues that because GL&PS is contractually required to keep its books in accordance with these FERC guidelines, federal question jurisdiction is thus created over claims for relief that arise from state law.

In *Franchise Tax Bd. v. Laborers Vac. Trust*, 463 U.S. 1, 77 L.Ed. 2d 420 (1983), this Court embarked on a review of the Court's previous decisions which examined what tests should be applied in determining whether a "civil action" arises under the Constitution, laws or treaties of the United States. *See*, 28 U.S.C. § 1331. Mr. Justice Brennan's opinion, speaking for a unanimous Court concludes:

> *"Our concern in this case is consistent application of a system of statutes conferring original federal court jurisdiction, as they have been interpreted by this*

> *Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."*

463 U.S., at 27-28, 77 L.Ed. 2d, at 442. (Emphasis added)

Petitioner must rely upon the allegations against Respondent Lay contained in his Amended and Restated Complaint in the application by this Court of the above-quoted principles. *Id.* To the extent that any of the allegations of said Complaint state claims for relief, any and all are state law-based claims: (1) plaintiff has alleged Respondent Lay willfully failed "to keep full and proper books and records," a violation of state law, (2) that Lay issued directives which caused GL&PS to violate the FERC guidelines, and this is a violation of state law; (3) that Lay caused the Town of Greeneville to breach its contact with TVA, breach of contract being a state law claim for relief; (4) that Lay engaged in certain ministerial acts which violated state law, making mandamus proper; (5) that Lay's acts resulted in Petitioner paying higher electric rates, making Lay personally liable under state law; (6) that Lay tortiously induced the Town of Greeneville to breach its contract with TVA, a state law claim for relief; (7) that the amount of payments made to state governmental subdivisions in lieu of taxes were reduced by Lay's acts, these payments being a function of state law; and (8) that Lay's actions resulted in the generation of reserve funds, when the utility was to be operated on a non-profit basis under state law. (R. 17-39; Amended and

Restated Complaint, pp. 1-23) It is abundantly clear that no federal law created these causes of action or claims for relief, to the extent they are causes of action or claims for relief at all. 463 U.S., at 27, 28. All are creatures of Tennessee law. *Id.; Gully v. First National Bank,* 299 U.S. 109, 81 L.Ed. 70 (1936).

The second part of the *Franchise Tax Board* guideline concerns whether Petitioner's "right to relief necessarily depends on resolution of a substantial question of federal law. 463 U.S., at 27, 28. The inclusion of FERC accounting guidelines in a contract creates no question which requires the "resolution" of any federal law question. *Lindy v. Lynn,* 501 F.2d 1367 (3rd Cir. 1974); *Becker v. Beame,* 454 F. Supp. 867 (S.D.N.Y. 1978). No federal law, not even the FERC guidelines themselves, 18 C.F.R. Part 101, places any legal obligations on GL&PS to even utilize these guidelines. More importantly, there is no federal claim for relief created either by the Federal Power Act or by the guidelines themselves when they are not followed. *Id.; see,* 16 U.S.C. §§ 825, 825(a).

Even where there are allegations contained in a complaint which allege a direct violation of federal law as part of a state law cause of action, there is no federal question jurisdiction "when Congress has determined there should be no private, federal cause of action for the violation . . . " of the federal law. *Merrill Dow Pharmaceuticals v. Thompson,* 478 U.S. 809, 817, 92 L.Ed. 2d 650, 664 (1986). Moreover, where state law incorporates an Act of Congress or other federal law as the applicable state standard, the "sounder view" is that federal question jurisdiction is not created except "when federal law is applicable by its own force." Wright, Miller & Cooper,

Federal Practice and Procedure: Jurisdiction 2d § 3563, p. 54; *see also, United Air Lines v. Division of Indus. Safety*, 633 F.2d 814, 816 (9th Cir. 1980); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241 (7th Cir. 1981), *cert. denied*, 455 U.S. 993, 71 L.Ed.2d 855; *Brame v. Ray Bills Finance Corp.*, 85 F.R.D. 568 (D.C.N.Y. 1979). Here, no federal cause of action has been created if FERC guidelines are not followed. There is no corresponding state law which mandates these guidelines be followed and creates a specific state law claim for relief if they are not. Surely, no substantial federal law question can thus arise where the FERC guidelines are merely incorporated into a contract. *Id.*

B. NO CASE SUPPORT FOR PETITIONER'S POSITION

No case cited by Petitioner supports his proposition that federal question jurisdiction is created by the inclusion of the guidelines in a contract. *Christopher v. Cavallo*, 662 F.2d 1082 (4th Cir. 1981) dealt with copyright infringement as an essential element of an action for breach of warranty, and since infringement was an area of exclusive original jurisdiction of the federal courts, subject matter jurisdiction existed. *Kinsey v. Nestor Exploration, Ltd*, 604 F. Supp. 1365 (E.D. Wa. 1985) holds only that federal jurisdiction exists where there is alleged a violation of federal law, where federal remedies are provided, even if a state remedy is sought. *Murphy v. Colonial Federal Savings & Loan Association*, 388 F.2d 609 (2nd Cir. 1967) recognizes that federal question jurisdiction exists where the intent of Congress was "that the rights of the

members of *federal* savings and loan associations to fair elections be governed by *federal law.*" *Supra,* at 611 (emphasis added). *Federal Housing Associates, Inc. v. Department of Housing and Urban Development,* 538 F. Supp. 1158 (E.D. Ark. 1982), involved a suit against a *federal agency,* had no state law claim for relief involved, and merely recognized that validly enacted administrative regulations could be treated as laws of the United States under 28 U.S.C. § 1331(a).

C. NO PENDENT JURISDICTION

Petitioner has apparently abandoned any argument that the district court should have retained pendent jurisdiction over the state law claims asserted against Respondent Lay after dismissal of TVA. There is, however, no basis for dispute with respect to finding by the district court that these existed no "overwhelming interests in judicial economy" which suggested the district court should retain jurisdiction over same in the absence of TVA as a party. (Pet. App. xvi-xvii). Likewise, there is no basis for questioning the findings of the court of appeals that it could not "discern either an 'overwhelming interest in judicial economy', or fairness issue, which would compel a reversal of the district court's dismissal of pendent state law claims." (Pet. App. xli-xlii).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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